

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1899.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, PLAINTIFF IN ERROR, *vs.* BESSIE F. SEARS, AS EXECUTRIX of the Last Will and Testament of STEPHEN P. SEARS, DECEASED, DEFENDANT IN ERROR.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES.

The PETITION of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, respectfully shows to this Honorable Court as follows :

I.

That your petitioner is a mutual life insurance company, created and chartered under and by virtue of an act of the Legislature of the State of New York of April 12th,

1842, entitled, "An Act to incorporate The Mutual Life Insurance Company of New York," and a citizen of said State, with its principal office in the City of New York.

That in the year 1876, the Legislature of the State of New York enacted a general statute entitled: "An Act regulating the forfeiture of life insurance policies" (Laws 1876, Chap. 341), as follows:

CHAPTER 341.

AN ACT regulating the forfeiture of life insurance policies.

Passed May 15, 1876.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, unless a notice in writing, stating the amount of annual premiums or interest due and when due on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, at his or her last known post office address, not less than thirty nor more than sixty days next before such payment becomes due, according to the terms of such policy.

SEC. 2. The affidavit of any officer, clerk, or agent of the company that the notice to the assured, provided for in Section 1, has been duly addressed and mailed by the company issuing such policy to the assured, shall be presumptive evidence of such notice having been duly given.

SEC. 3. This act shall take effect immediately.

This statute was amended by the following statute of 1877 :

CHAP. 321.

“AN ACT to amend chapter three hundred and forty-one of the laws of 1876, entitled “An act regulating the forfeiture of life insurance policies.”

Passed May 23, 1877.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS :

SECTION 1. Section one of chapter 341 of the laws of eighteen hundred and seventy-six, entitled ‘An act regulating the forfeiture of life insurance policies,’ is hereby amended so as to read as follows :

“SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest shall be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or

to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding ; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

SEC. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given.

If this New York statute governed this policy at all *which we deny*, then the above act of 1877 governed the premium due *May 18, 1892*, the second premium, which was paid.

The Legislature of New York thereafter repealed the above acts by Chapter 690 of the Laws of New York for 1892, which went into effect October 1st, 1892, and by the same act of 1892, legislated as follows :

“Sec. 92. No Forfeiture of Policy Without Notice. No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day when it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of

such notice. The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given."

If this New York statute governed the policy at all, *which we deny*, then the above act of 1892 governed the premiums due dates, May 18, 1893, 1894, 1895, and 1896, the third, fourth, fifth and sixth premiums, none of which were paid.

This section was amended by Chapter 218, Laws 1897, so as to read as follows, taking effect April 8, 1897.

The same statute (Ch. 690, L. 1892) enacted the following section :

CHAP. 218.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

* * * * *

§ 2. Section ninety-two of said chapter is hereby amended so as to read as follows :

"SEC. 92. NO FORFEITURE OF POLICY WITHOUT NOTICE.—No life insurance corporation doing business in this State shall within one year after the default in payment of any premium, installment or interest declare forfeited or lapsed—any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, within one

year from the failure to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address in this State, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action

shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.

SEC. 3. This act shall take effect immediately."

If this New York statute governed this policy at all *which we deny*, then the above act of 1897 governed the premium due May 18, 1897, the seventh premium, which was not paid.

That in an act of the Legislature of the State of Washington, entitled, "An act relating to foreign corporations and to repeal certain laws in connection therewith," approved March 28th, 1890, the following provisions are contained :

"Section 1. That any corporation incorporated under the laws of any state or territory in the United States, or of any foreign country, state or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state, shall have full power and is hereby authorized to sue and to be sued in any court having competent jurisdiction ; to acquire, purchase, hold, mortgage, sell, convey or otherwise dispose of in the corporate name, all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate by mortgage or otherwise due to, or loans made by such foreign corporations within the boundaries of this state, either prior to or after the passage of this act, and generally to do and perform every act and transact every kind of business within this state, in the same manner and to the same extent as corporations incorporated

and organized under the laws of this state, are authorized to do under the laws of this state, by a compliance with all the conditions prescribed by the second and third sections of this act."

That prior to the 18th day of May, 1891, your petitioner was transacting business in the Territory, now State, of Washington, and in compliance with the requirements of such statute had filed and recorded in the office of the Secretary of said State a duly certified copy of its charter, and had also constituted and appointed F. L. Stinson, residing at Seattle, in said State, its agent, that being the place where the principal business of your petitioner was carried on in said State.

II.

Your petitioner states that prior to the 18th day of May, 1891, *and until his death, March 30, 1898*, one Stephen P. Sears, resided in the City of Tacoma, and was a citizen of the State of Washington.

That prior to the 18th day of May, 1891, the said Stephen P. Sears, at Tacoma, made to your petitioner his application in writing for a policy of life insurance upon his life in the sum of \$10,000, and there underwent the usual medical examination. That said application provided that the policy to be issued pursuant to it should not take effect until the first premium had been paid, and the policy had been delivered during the applicant's continuance in good health, and that the application was made subject to the charter of the company and the laws of the State of New York. That after signing said application said Stephen P. Sears delivered it at Tacoma to F. L. Stinson, the petitioner's agent, who transmitted the same to the petitioner's home office at the City of New York. Upon said

application the petitioner executed its policy on the life of said Sears bearing date May 18th, 1891, and forwarded the same by mail to its agent at Tacoma, and said Stephen P. Sears at Tacoma paid the first annual premium on said policy and the same was there delivered to him by your petitioner through its said agent.

The following, excepting provisions of the contract not affecting this case, is substantially a copy of said policy of insurance :

**THE MUTUAL LIFE INSURANCE COMPANY OF
NEW YORK.**

No. 453,516.

Amount \$10,000.

Man's Life, Limited Payment, Twenty-Year Distribution
Policy, Age 31 Years. Annual Premium for 10
Years, \$491.

In consideration of the application of this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay at its home office in the City of New York, unto Stephen P. Sears, of Tacoma, in the County of Pierce, State of Washington, his executors, administrators or assigns, ten thousand dollars, upon acceptance of satisfactory proof at its home office, of the death of said Stephen P. Sears during the continuance of this policy, upon the condition, and subject to the provisions, requirements and benefits stated on the back of this policy which are hereby referred to and made part hereof :

The annual premium of four hundred and ninety-one dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the City of New York, on the eighteenth day of May in every year during the continuance of this contract,

until premiums for ten years shall have been duly paid to said company.

In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its President and Secretary, at its office in the City of New York, the eighteenth day of May. A. D., one thousand eight hundred and ninety-one.

RICHARD A. McCURDY, President.

C. F. SCHRODER, Asst. Secretary.

The receipt of the first payment of premium hereon is acknowledged.

W. J. EASTON, Secretary.

"Provisions, Requirements and Benefits.

"Payment of Premiums.—Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void for non-payment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided."

That said insured never paid any premium subsequent to the first, and upon default in the payment of the second annual premium the policy was entered upon the books of your petitioner as lapsed and forfeited, and your petitioner, through its agent, applied to said Stephen P. Sears

personally to make restoration of his policy by paying the defaulted premiums, but he advised your petitioner's agent that he would neither renew the policy nor make any further payment of premiums upon it.

III.

Your petitioner further states that after the death of the insured at Tacoma, March 30th, 1898, an action was commenced *on September 28, 1898*, by defendant in error to recover Ten Thousand Dollars, the amount of the policy, with interest, in the United States Circuit Court for the District of Washington, Western Division, in her complaint setting forth the policy of insurance, and alleging compliance with its terms on the part of the insured during his life time. This action was commenced more than *six years* after the first default and *sixteen months* after the default in the premium due *May 18, 1897*, which was the last premium due before the insured's death, *March 30, 1898*. Your petitioner in said action admitted the execution of the policy, but denied the same was executed in the State of New York, or elsewhere than in the State of Washington, and controverted compliance on the part of the insured or plaintiff in the action with the terms and conditions of the policy, and alleged affirmatively that the insured failed, neglected and refused to pay the premium due on the policy *May 18th, 1893, and never paid anything whatever on account of subsequent premiums*, and that on account thereof the said policy lapsed and your petitioner caused it to be entered upon its books and records as a lapsed and forfeited policy. Your petitioner also pleaded that the insured was from the date of the application until his death a resident of Tacoma, and a citizen of Washington. That he had

made his application for insurance to your petitioner's agent at Tacoma, and had there undergone medical examination pursuant to the application. That his application was transmitted to your petitioner by mail to New York, and the policy issued thereon was transmitted to your petitioner's agent at Tacoma, and thereupon the payment of the first annual premium of Four Hundred and Ninety-one Dollars, delivered to the said Stephen P. Sears.

That subsequent to May 18th, 1893, your petitioner informed said Stephen P. Sears that said policy had been declared and entered lapsed and void for non-payment of premiums as aforesaid, and through its agents applied to said Sears to make restoration of said policy and offered to renew the same upon payment of defaulted premiums, but that said Sears refused either to make said payment or to have such policy renewed, or to longer continue the policy, and then and there informed your petitioner that he elected to have said policy terminated, and your petitioner, relying upon such election and representations on the part of said Sears, at all subsequent times treated said policy as lapsed, abandoned and terminated, and relying upon the conduct and representation of said insured abstained from taking any further action in relation to said policy.

Your petitioner further represents that the said defendant in error, plaintiff in said action in the Circuit Court, demurred to the answer of your petitioner and to each of the separate defenses therein contained for the reason that the same do not state facts sufficient to constitute a defense to the cause of action in the complaint pleaded, and the demurrer was sustained to the whole of your petitioner's answer, and separately to each of the defenses therein contained, to which ruling of the Court

your petitioner at the time excepted. And your petitioner, electing to stand upon its answer in said Circuit Court, upon motion of the defendant in error and against the exception of your petitioner, said Court entered its judgment in favor of defendant in error and against your petitioner for Seven Thousand Four Hundred and Forty-eight and 94/100 Dollars, with interest and costs. That your petitioner feeling aggrieved by the judgment of said Circuit Court, sued out a writ of error in the Circuit Court of Appeals for the Ninth Circuit for the correction of the manifest errors that had happened, to the damage of your petitioner, as shown by the records and proceedings, as well as the judgment in said cause, and the returned writ of error having been made to the said Circuit Court of Appeals, the cause came on for hearing before said Court, and on the 9th day of October, 1899, said Circuit Court of Appeals rendered its judgment in writing, affirming the judgment of the said Circuit Court.

IV.

Pursuant to its written opinion, said Circuit Court of Appeals has entered its judgment affirming the judgment of the Circuit Court.

V.

Your petitioner states that on the face of the record of said cause as the same is on file and was presented in said Circuit Court of Appeals, with the assignment of errors made and presented by your petitioner in said Circuit Court of Appeals, the following questions and propositions were and are in issue in the adjudication of said cause.

FIRST.

Whether the statutes of New York of 1877, 1892 and 1897 respectively apply at all to the State of Washington or in any event to this case where the policy was delivered and the first premium paid in the State of Washington.

SECOND.

Whether if the policy was delivered in the State of Washington and there became a binding contract, it was lawful for the parties to provide in it for a waiver of notice of the due date of premiums.

THIRD.

Whether the New York statutes are merely ones of regulation, effective only within the State of New York, or whether they were when in force respectively a part of the charter of your petitioner, and limited its powers of contracting outside the State of New York, and whether it was competent for the parties in an agreement subsequent to the delivery of the policy to enter into another agreement by which they dispensed with the notice prescribed by the New York statutes if the same applied.

FOURTH.

Whether confessed knowledge of the amount of premiums and the date of their payment, and an express refusal on the part of the insured to make payment obviates the necessity of statutory notice, if the same is required.

FIFTH.

Whether the statutes of New York of 1877, 1892 and 1897 respectively, being of a general nature, apply to your petitioner, a corporation created and chartered under a special act of the Legislature of that State.

SIXTH.

Whether the policy of the State of Washington according freedom of contract should be a controlling reason for holding this policy a Washington instead of a New York contract.

SEVENTH.

Whether the failure to give notice of a particular premium maturing under the acts of 1877, 1892 and 1897 respectively will have the effect of keeping the policy alive, notwithstanding all subsequent premiums have been knowingly left unpaid by the insured.

EIGHTH.

Whether even if the statute of 1877 applied at all it did not apply only to the premium due May 18th, 1892, which was paid, and whether the statute of 1892 if it applied at all did not apply only to the premium due dates respectively May 18th, 1893, May 18th, 1894, May 18th, 1895, and May 18th, 1896, and whether the statute of 1897 if this series of statutes applied at all, did not apply to the premium due May 18th, 1897, and whether if the

statute of 1897 applied to the premium due May 18th, 1897, there was no obligation to send any notice, because Sears was not a resident of the State of New York.

NINTH.

Whether, although your petitioner failed to give the notice under the Acts of 1877, 1892 and 1897 respectively (if required), and all subsequent premiums due prior to the death of the insured remained unpaid, it would be an unlawful appropriation of your petitioner's property, without consideration, to require your petitioner in case of the death of the insured to pay the policy.

TENTH.

In event it should be held the statutes of New York of 1877, 1892 and 1897 respectively, apply to this case, whether an action can be brought to recover the amount of the policy until payment has been made or tendered of the past due and unpaid premiums.

ELEVENTH.

Whether, in this action, pleading only the policy of insurance, and a performance by the insured of its conditions and without pleading the statutes of New York of 1877, 1892 and 1897 respectively, a recovery can be had when plaintiff admits non-payment of all premiums subsequent to the first up to the death of the insured.

TWELFTH.

Whether it is not a fatal departure from law to law for a plaintiff, alleging as his cause of action a policy of insurance and compliance with its terms, and admitting the defense of non-payment of premiums, to recover judgment because defendant has failed to show compliance with the statutes of New York of 1877, 1892 and 1897 respectively (if the same apply) in regard to mailing notice of the due date of premium, notwithstanding said statutes have not been pleaded by either plaintiff or defendant in the case.

THIRTEENTH.

Whether, in this action, the statute of April, 1897 (which declares "no action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof, for which it is claimed that the forfeiture ensued"), precludes a recovery in this case, the action having been commenced on the 28th day of September, 1898, more than one year from May 18, 1897, the last pension due date before death.

FOURTEENTH.

Whether under the charter of the defendant Company and the Statutes of the State of Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the Company.

VI.

Your petitioner states that it has issued and now outstanding in the different Territories and States of the Union, many of life insurance policies, and has entered into such contracts with large numbers of the residents and citizens of the State of Washington, and other life insurance corporations, created and organized under the laws of the State of New York, have entered into and now have outstanding large numbers of similar policies in such States and Territories. That at the time of rendering its opinion in this case the Honorable Circuit Court of Appeals rendered similar opinions and upon substantially the same questions in three other cases wherein your petitioner is plaintiff in error and that another case in which your petitioner is plaintiff in error has been submitted to the said Circuit Court of Appeals involving the same questions, and a number of similar cases are now pending for decision in the United States Circuit Court for the District of Washington. That in view of the large amount of money involved in said cases, and in view of the difference in judicial opinions respecting a number of the questions involved in the cases, your petitioner represents that the gravity of the matters in this case is such that they should be authoritatively and finally adjudicated by this Honorable Court, upon a full and fair presentation of the merits of the case (or so much of them as the Court may direct) on the part of your petitioner and the said defendant in error Bessie F. Sears.

That the Phinney case (No. 12 on the calendar of this Court) involves many of the above questions.

VII.

Your petitioner states that a certified copy of the entire record in said case in the said Circuit Court of Appeals is

herewith furnished and hereto annexed as a part of this application, in conformity to Rule 37 of this Honorable Court relating to cases in the Circuit Court of Appeals, and the same is marked "Exhibit A."

WHEREFORE, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, certifying the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals in said cause therein entitled "The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, *vs.* Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, defendant in error, No. 541," to the end that the said cause may be reviewed and determined by this Court as provided by Section 6 of an Act of Congress, entitled: "An Act to Establish Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States and for Other Purposes," approved March 3d, 1891, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity to said act, and that the said judgment of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
ROBERT C. STRUDWICK,

Attorneys and Counsel for Petitioner.

SOUTHERN DISTRICT OF NEW YORK, } ss.
COUNTY OF NEW YORK.

EDWARD LYMAN SHORT, being duly sworn, says : That he is one of the attorneys and of counsel for The Mutual Life Insurance Company of New York, the Petitioner above named, and as such has had personal charge for it of the case in the foregoing petition named in the Circuit Court of Appeals for the Ninth Circuit. That he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

EDWARD LYMAN SHORT.

Subscribed and sworn to before me, this 16th day of November, A. D., 1899.

ALFRED MACKAY,
[SEAL.] Notary Public,
New York Co.